**MANICKAM & ORS.**

**v.**

**PUBLIC PROSECUTOR**

HIGH COURT MALAYA, SEREMBAN
WONG KIM FATT JC
[CRIMINAL APPLICATION NO. 4 OF 1981]
1 DECEMBER 1981

***CRIMINAL PROCEDURE:*** *Bail - Grant of - Charge of gang robbery - Jurisdiction of Sessions Court - Whether President of Sessions Court empowered to grant bail thereof - President refusing bail - Whether proper - Penal Code s. 395 - Criminal Procedure Code s. 388(i).*

***WORDS AND PHRASES:*** *"Imprisonment for a term which may extend to twenty years" - "Imprisonment for life" - Proper interpretation - Penal Code s. 395 - Criminal Procedure Code s. 388(i).*

This was an appeal against the decision of the Sessions Court dismissing the application for bail by the accused. The five accused herein were jointly charged with gang robbery under s. 395 Penal Code, and pending trial, applied for bail under s. 388(i) Criminal Procedure Code. The learned Sessions Judge took the view that s. 395 Penal Code, by prescribing an alternative punishment of twenty years imprisonment, was prescribing a sentence of "imprisonment for life", and so refused bail. According to the learned President, he had no power to grant bail in the circumstances, as s. 388(i) Criminal Procedure Code clearly precluded him from granting bail where the offence is punishable with death or life imprisonment. The accused appealed and argued that the learned President has the power to grant bail and that the term "imprisonment for a term which may extend to twenty years" in s. 395 Penal Code did not mean "imprisonment for life". Before the learned appellate Judge, the primary issue that arose was whether the expression prisonment for a term which may extend to twenty years" is the same as "imprisonment for life".

**Held:**

**[1]** The answer to the matter before this Court depends on the interpretation of the words "imprisonment for a term which may extend to twenty years" appearing in s. 395 Penal Code.

**[2]** Although s. 57 of the Penal Code and s. 3 of the Criminal Justice Ordinance 1953 provide that imprisonment for life shall be reckoned or deemed to be imprisonment for twenty years, it cannot safely be said or construed that if a person is punished with imprisonment for a term which may extend to twenty years, he is punished with imprisonment for life.

**[3]** The words of s. 395, as amended, are plain and clear. The maximum custodial sentence now for gang-robbery shall not exceed twenty years under s. 395. To hold that a prison term not exceeding twenty years i.e. a term from anything up to twenty years, is synonymous with or equivalent to imprisonment for life is to overstretch the rule of construction.

**[4]** It is a well established principle that a penal legislation such as the Penal Code should be construed strictly, rather than liberally. And in construing the clear provisions of the amended s. 395, the Court need not take into account the explanatory statement to the Bill.

**[5]** The Sessions Court has the jurisdiction to hear and decide the application under s. 388(i) of the Criminal Procedure Code for bail by the accused. It ought also to be noted that the Sessions Court now has the jurisdiction to try all offences other than offences punishable

with death and may pass any sentence allowed by law other than the sentence of death, which falls within the jurisdiction of the High Court. Since the President of the Sessions Court has the jurisdiction to try the accused charged with gang-robbery, there is no reason why he should not in principle have the jurisdiction to perform the less ardous task of deciding whether or not to grant bail pending trial before him.

**[6]** The law is clear that the High Court in its absolute discretion may under s. 388 and 389 of the Criminal Procedure Code grant bail to an accused person pending trial after his application for bail has been refused. In the circumstances of this case the accused should be granted bail in the sum of RM 4000 each in one surety, the bail bond to be executed in Sessions Court, Seremban.

*[Appeal allowed. Order accordingly.]*

**Cases referred to:**
*Yanasengam & Ors. v. PP [1978] 1 MLJ 269*
*Herron v. Rathmines & Rathgar Improvement Commissioners [1892] AC 498*
*Lumsden v. Inland Revenue Commissioners [1914] AC 877*
*R.P. Kapur v. Pratap Singh Kairon [1964] AIR SC 295*
*Sulaiman bin Kadir v. PP [1976] 2 MLJ 37*
*Che Su binti Daud v. PP [1978] 2 MLJ 162*

**Legislation referred to:**
Criminal Justice Ordinance 1953, s. 3
Criminal Procedure Code, ss. 388, (i), 389
Firearms (Increased Penalties) Act 1971
Penal Code, s. 57, 125A, 130A(b), 395
Penal Code (Amendment and Extension) Act 1976 (Act A327)
Subordinate Courts Act 1948 ss. 63, 64

**Other sources referred to:**
*Mallal's Criminal Procedure Code*, 4th Edn., p. 551

*For the accused/applicant - K. Gunaretnam; M/s Gunaretnam & Co.*
*For the respondent - Balia Yusof, DPP*

**JUDGMENT**

**Wong Kim Fatt JC:**

This is an application for bail pending trial under s. 388(i) of the Criminal Procedure Code by the five accused jointly charged with an offence of gang-robbery under s. 395 of the Penal Code. The accused, the applicants in these proceedings, were arrested on 26 October 1981, and were eventually produced before the President, Sessions Court, Seremban, on 11 November 1981, when their application for bail was refused by the learned President. The trial of the accused was fixed on 22 and 23 March 1982, before the President. It appears that in the Sessions Court, the prosecuting officer did not object to the application for bail and that the decision of the President to refuse bail was based solely on the judgment of Abdul Razak J in *Yanasengam & Ors. v. PP* [1978] 1 MLJ 269 a case involving gang-robbery, in which the learned Judge dismissed the application for bail.

The answer to the matter before me depends on the interpretation of the words "imprisonment for a term which may extend to twenty years" appearing in s. 395 of the Penal Code.

Section 388(i) of the Criminal Procedure Code dealing with bail pending trial reads as follows:

388(i) When any person accused of any non-bailable offence is arrested or detained without warrant by a police officer or appears or is brought before a Court, he may be released on bail by the officer in charge of the police district or by such Court, but he shall not be so released if there appears reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life:

Provided that the Court may direct that any person under the age of sixteen years or any woman or any sick or infirm person accused of such an offence be released on bail.

Before its amendment in 1976, s. 395 of the Penal Code read as follows:

395. Whoever commits gang-robbery shall be punished with imprisonment for life, or for a term which may extend to ten years, and shall also be liable to whipping.

In 1976, by the Penal Code (Amendment and Extension) Act 1976 (Act A327), which came into force on 31 March 1976 (PU(B) 139/76), considerable amendments were made to the Penal Code (FMS Cap. 45), which was extended to have effect throughout Malaysia, repealing at the same time the Penal Code of Sabah and the Penal Code of Sarawak. One of these amendments affects s. 395 of the Penal Code in which the words "imprisonment for life, or with imprisonment for a term not exceeding ten years" were replaced by the words "imprisonment for a term which may extend to twenty years". As amended, s. 395 of the Penal Code now reads:

395. Whoever commits gang-robbery shall be punished with imprisonment for a term which may extend to twenty years**,** and shall also be liable to whipping.

Encik Gunaretnam, learned Counsel for the accused, submits that in view of the amendment, gang-robbery is no longer punishable with life imprisonment and therefore the learned President has the power to grant bail. Encik Balia Yusof, the learned DPP, on the other hand , contends that the Legislature has never intended to distinguish between "imprisonment for life" and "imprisonment for a term which may extend to twenty years", so that the net effect of the amendment is that gang-robbery is still punishable with life imprisonment, in which case the Sessions Court has no power to grant bail.

In amending s. 395, the Legislature did not amend s. 57 of the Penal Code, which still reads as follows:

57. In calculating fractions of terms of punishment, imprisonment for life shall be reckoned as equivalent to imprisonment for twenty years.

Neither was s. 3 of the Criminal Justice Ordinance 1953, amended. Section 3 of this ordinance, which abolished penal servitude and whipping with a cat-o'-nine tails, reads:

3. Where any person is treated as having been sentence or is hereafter sentenced to imprisonment for life, such sentence shall be deemed for all purposes to be a sentence of imprisonment for twenty years.

It may be noted that after the amendment s. 130A(b) of the Penal Code expressly stipulates that imprisonment for life means imprisonment until the death of the person on whom the sentence is imposed in contradistinction with imprisonment for twenty years. In section 125A of the Penal Code, the custodial sentence thereunder is imprisonment for life (which in the context means the natural life of the accused as in the case of imprisonment for life under the Firearms (Increased Penalties) Act 1971) or, in the alternative, imprisonment for a term which may extend to twenty years. Thus, besides death sentence we have now under our law (1) imprisonment for life until the death of the convicted accused (a sentence unknown to Malaysian criminal law until very recent years), (2) imprisonment for life reckoned or

deemed to be twenty years, and (3) imprisonment for a term which may extend to twenty years. The question for determination is whether the expression "imprisonment for a term which may extend to twenty years" is the same as "imprisonment for life".

Although s. 57 of the Penal Code and s. 3 of the Criminal Justice Ordinance provide that imprisonment for life shall be reckoned or deemed to be imprisonment for twenty years, I do not think, as a corollary or logical conclusion, it can safely be said or construed that if a person is punished with imprisonment for a term which may extend to twenty years, he is punished with imprisonment for life. The words of s. 395, as amended, are plain and clear. The maximum custodial sentence now for gang-robbery shall not exceed twenty years under s. 395. To hold that a prison term not exceeding twenty years (that is a term from anything up to twenty years) is synonymous with or equivalent to imprisonment for life is to overstretch the rule of construction. It is a well-established principle that a penal legislation such as the Penal Code should be construed strictly, rather than liberally. In construing the clear provisions of the amended s. 395, I need not take into account the explanatory statement to the Bill except for the limited purpose of understanding the background and antecedent state of affairs leading to the legislation. Prior to the amendment, the Court could either sentence the accused to imprisonment for life or to a maximum term of ten years. Ironically, it could not pass a sentence of between ten and twenty years.

In *Herron v. Rathmines & Rathgar Improvement Commissioners* [1892] AC 498, 501, 502, at 501, 502, Lord Halsbury LC in the House of Lords concurred with what Fitz-Gibbon LJ had that "we cannot interpret the Act by any reference to the Bill, nor can we determine its construction by any reference to its original form ".

In *Lumsden v. Inland Revenue Commissioners* [1914] AC 877, 924 at 925, Lord Parmoor said:

> A statute is the expression of the will of the Legislature, and it is the duty of the Courts to give effect to the language in which the will of the Legislature has been expressed. It is not the function of Courts of law to entertain questions of policy ...

He also cautioned at p. 924 that "care must be taken that this [method of interpretation] is done not to make law, but only to expound it".

The Indian Supreme Court in *R.P. Kapur v. Pratap Singh Kairon* [1964] AIR SC 295, had decided that the Bill, the alterations made in it during its passage through the Committee, the Statement of Objects and Reasons and the Report of the Select Committee could not be legitimately taken into account in construing an absolutely clear provision.

In the circumstances, I hold that the Sessions Court has the jurisdiction to hear and decide the application under s. 388(i) of the Criminal Procedure Code for bail by the accused (all over 18 years of age), who are charged under s. 395 of the Penal Code. It must not be misunderstood that by the amendment to the Penal Code, the Legislature is viewing the offence of gang-robbery less seriously, at the expense of the administration of justice. With the amendment to the Subordinate Courts Act 1948, (Revised 1972) by Act A434 with effect from 1 July 1978, the Sessions Court has been entrusted with increased criminal jurisdiction to try many offences hitherto triable by the High Court. The Sessions Court now has the jurisdiction to try all offences other than offences punishable with death (s. 63) and may pass any sentence allowed by law other than the sentence of death (s. 64), which falls within the jurisdiction of the High Court. Since the President of the Sessions Court has the jurisdiction to try the accused charged with gang-robbery, I see no reason why he should not in principle have the jurisdiction to perform the less arduous duty of deciding whether or not to grant bail pending trial before him. As Harun J observes, "As a matter of principle,

I think a Court that has been conferred with jurisdiction to try a case should also be given discretionary powers to grant bail. This would be in keeping with the provisions of the Criminal Procedure Code, where magistrates possess the unfettered power to grant bail in all cases including cases not triable by them, except offences punishable with death or life imprisonment where only a Judge may grant bail." (*Sulaiman bin Kadir v. PP* [1976] 2 MLJ 37,38 at 38).

The law is clear that the High Court in its absolute discretion may under ss. 388 and 389 of the Criminal Procedure Code grant bail to an accused person pending trial after his application for bail has been refused by the lower Courts, even if an offence with which the accused is charged is punishable with death or imprisonment for life. The judgments of Harun J in *Sulaiman bin Kadir v. PP*, and Gunn Chit Tuan J in *Che Su binti Daud v. PP* [1978] 2 MLJ 162, are in point.

In cases where there appear reasonable grounds for believing that the accused has been guilty of an offence punishable with death or imprisonment for life, because of the seriousness of the offence charged no bail should be granted, unless the accused satisfies the High Court that there are exceptional and special grounds justifying the granting of bail. In such an event, the burden is on the accused. In other cases of lesser charges, bail should, in my opinion, normally be granted as a matter of course, unless the prosecution can satisfy the Court that in the interest justice bail should not be granted. In all cases (whether bailable or not bailable) the High Court has the discretion to grant bail under ss. 388 and 389 of the Criminal Procedure Code, but, as has often been said, that discretion must always be exercised judicially. The points for consideration in granting or refusing bail may be found on p. 551 of *Mallal's Criminal Procedure Code* (4th Edn.)

The amount of every bail bond should not be excessive but be reasonable in the circumstances the case as being sufficient to secure the attendance of the person arrested or charged with an offence. An excessive bail bond may defeat the granting of bail as the accused may find difficulty in getting a bailor acceptable to the Court. The reason arises from the principle and basis of our criminal law that the accused is presumed to be innocent until proven guilty.

The present application for bail is supported by the affidavits of the five accused. The Deputy Public Prosecutor did not file an affidavit in opposition. The affidavits of the accused disclose *inter alia* that their trial is some four months from now, that they will not abscond or tamper with prosecution witnesses and that they have no previous convictions. These to my mind merit the granting of bail. As to the bail bond learned Counsel for the accused suggested a figure of RM3,000 each, while the learned Deputy suggested RM5,000.

In the circumstances of the case, the accused should be granted bail in the sum of RM4,000 each in one surety, the bail bond to be executed in the Sessions Court, Seremban.

Also found at [1982] CLJ 162